

1. **MUSAWI (Migration) [2018] AATA 1045 (19 March 2018)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs HOSNIAH BIBI MUSAWI

VISA APPLICANT: Miss MASOMA BIBI HUSSEINI

CASE NUMBER: 1605278

DIBP REFERENCE(S): 2012/000390

MEMBER: Kira Raif

DATE: 19 March 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:

- Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Statement made on 19 March 2018 at 4:48pm

CATCHWORDS

Migration – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) visa – Bogus documentation – False identity document – Compelling circumstances – Australian permanent residents – Family are settled in Australia – No previous records of breaches of cl 4020(2A)

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994 r 1.03 Schedule 2 cl 117.223 Schedule 4 Criteria 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Mudiyanselage v MIAC [2013] FCA 266

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 March 2016 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).
5. The visa applicant is a national of Afghanistan, born in December 1996. She applied for the visa on 29 May 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the visa applicant met the Public Interest Criterion (PIC) 4020. The sponsor ('the review applicant') seeks review of the delegate's decision.
6. The review applicant appeared before the Tribunal on 8 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's spouse and son. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The review applicant was represented in relation to the review by her registered migration agent. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

RELEVANT LAW

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
8. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B).
9. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment

to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

10. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

12. The review applicant provided to the Tribunal a copy of the primary decision record. It indicates that as evidence of her identity, the visa applicant submitted with the application an Afghani tazkera and a hand-written passport issued by the Afghan Consulate-General in Quetta, Pakistan. The delegate refers in the primary decision record to prevalent fraud in relation to Afghan identity documents, noting that the passport presented by the applicant cannot constitute probative evidence of identity because it is based on the information contained in the tazkera.
13. The primary decision record indicates that the overseas post sought independent verification of the visa applicant's tazkera No 426632. The decision record indicates that the tazkera was found not to have been registered and was 'prepared fraudulently'. The visa applicant was invited to comment on that information. In response, the applicant provided comments on the waiver.
14. The review applicant argues in her written submission to the Tribunal that the visa applicant did not provide a bogus document because the documents were issued by the appropriate authorities and she had no control over the matter. The review applicant provided to the Tribunal copies of the visa applicant's passport and the new tazkera. The review applicant refers on another decision of the Tribunal although the Tribunal is mindful that such decisions have no precedential value.
15. The Tribunal finds the applicant's submission unpersuasive. Even if the tazkera was issued by the relevant authority, as the review applicant claims, it may still be a bogus document for example if it was altered or issued by a person without authority. Thus, establishing the source of the document does not necessarily assist the visa applicant.
16. The review applicant also argues that it was beyond the visa applicant's control whether the authorities did a proper verification of the documents but there is nothing to suggest that a 'proper' verification was not carried out. The review applicant's representative refers to a different spelling of the visa applicant's name as evidence of the officials' 'carelessness' but the Tribunal does not consider that a different transliteration of a foreign name can serve as an indication that appropriate inquiries had not been carried out in verifying the tazkera. As the inquiries had been carried out by the representatives of the Australian embassy, the Tribunal does not accept the review applicant's suggestion that incorrect information had

been deliberately provided as a form of discrimination towards religious and ethnic minority. The Tribunal considers the evidence obtained by the Australian officials, as set out in the primary decision record, to be probative.

17. In oral evidence to the Tribunal the review applicant said that they had no documents, so they approached someone at the Afghani Consulate and they did not know that the tazkera was a bogus document, otherwise they would never have provided it. The review applicant said they did not know that the Consulate would issue a bogus document. The Tribunal acknowledges that it is possible that the visa applicant was not willingly or intentionally involved in the preparation of the bogus document but it is not necessary to establish the visa applicant's involvement. As long as there was an element of fraud or deception by some person – not necessarily the visa applicant – PIC 4020 applies (*Trivedi v MIBP* [2014] FCAFC 42).
18. The Tribunal is mindful that the review applicant provided further identity documents to the Tribunal relating to the visa applicant. These documents do not assist the visa applicant in relation to the issue at hand. If it is determined that the earlier submitted document was a bogus document, PIC 4020 would be engaged irrespective of the authenticity, or otherwise, of the newly submitted document (*Mudiyanselage v MIAC* [2013] FCA 266).
19. Having regard to the information contained in the primary decision record, and the result of the verification, the Tribunal reasonably suspects that the visa applicant's tazkera that was included in the primary application is counterfeit or has been altered by a person who does not have the authority to do so and is a bogus document within the meaning of s. 5(1) of the Act. The Tribunal finds that there is evidence that the visa applicant has given, or caused to be given, to the Minister or an office, a bogus document within the meaning of s. 5(1) of the Act. The Tribunal is not satisfied the visa applicant meets PIC 4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY PIC4020(1)?

20. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC4020(2AA).
21. There is no evidence before the Tribunal to indicate that he visa has previously been refused on the basis of a failure to satisfy PIC 4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

22. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
23. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

24. In the course of the hearing the Tribunal invited the review applicant to provide evidence relating to the waiver. In her written submission to the Tribunal of 2 February 2018 the review applicant provided to the Tribunal evidence concerning her health, including medical reports and evidence of ongoing psychological treatment. The Tribunal accepts on the basis of this evidence that the review applicant has ongoing health issues for which she is receiving treatment. The Tribunal accepts that the review applicant has recently been referred for mental health treatment and has made appointment with STARTTS although there is no evidence of ongoing treatment. The Tribunal acknowledges the psychological evidence presented to the Tribunal and accepts that the review applicant's health may be adversely affected by the stress of separation with the visa applicant.
25. The review applicant also notes that her partner and six children are Australian permanent residents and are settled in Australia. Evidence of the children's schooling has been presented to the Tribunal and the Tribunal accepts that the family are settled in Australia.
26. The review applicant's husband and son told the Tribunal that the visa applicant is suffering daily because her sister is not present. The review applicant claims in her submission of 2 February 2018 that she would leave her family in Australia to take care of the visa applicant and she would be subjected to harm if she were to travel to Pakistan. The Tribunal does not accept that evidence, given that the present application was made some six years ago and the review applicant has made no attempt to return to Pakistan to take care of the visa applicant in that period. There is no evidence whatsoever that any steps have been made by the review applicant to abandon her family in Australia and travel overseas. The Tribunal does not consider that the review applicant has any intention of travelling overseas to take care of the visa applicant.
27. The review applicant spoke to the Tribunal about the visa applicant's difficult circumstances. In her post-hearing submission she provided to the Tribunal a DFAT report concerning the situation in Pakistan. The Tribunal acknowledges that evidence but the waiver relates to the circumstances of an Australian citizen or permanent resident, not the circumstances of the visa applicant who is neither an Australian citizen nor an Australian permanent resident.
28. The Tribunal is mindful that much of the review applicant's medical evidence relates to her general health and not any condition that would be affected by the visa applicant's circumstances and that the psychological evidence that addresses the effect of the separation with the visa applicant is quite recent and appears to have been obtained for the purpose of this application. Nevertheless, the Tribunal is prepared to accept that the ongoing separation between the visa applicant and the sponsor has an adverse effect on the sponsor's health. The Tribunal accepts there is a strong relationship between the visa applicant and the review applicant and her family in Australia and that the review applicant and her family are adversely affected as a result of the separation and the visa applicant's safety and general circumstances. The Tribunal is satisfied, on balance, that there are compassionate circumstances affecting the interests of an Australian citizen or permanent resident that justify the granting of the visa. Therefore the requirements of cl.4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

29. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
30. As noted above, the visa applicant provided with her application, as evidence of her identity, a tazkera and a passport. Both documents had been issued recently and the inquiries made by the overseas post indicate that the tazkera was found not to have been registered and prepared fraudulently. As such, the presented tazkera cannot be probative evidence of the visa applicant's identity. Further, the primary decision record indicates that the passport –

which was also recently issued and appears to have been issued for the purpose of this application – was issued on the basis of the information contained in the tazkera. If that information has not been verified, and there have been no independent assessment of the visa applicant's identity, the Tribunal is not satisfied that the passport constitutes probative evidence of the visa applicant's identity. No other documents had been submitted with the primary application to evidence the visa applicant's identity.

31. The review applicant provided a new tazkera to the Tribunal relating to the visa applicant. This document has been verified by the overseas post and on 19 March 2018 the Tribunal received advice of a genuine outcome. That is, the tazkera belongs to the visa applicant. The Tribunal considers the tazkera to be probative evidence of one's identity and the /visa applicant's tazkera has been confirmed as having been issued to her. On the basis of this record, the Tribunal is satisfied as to the visa applicant's identity. The Tribunal finds that she meets PIC4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

32. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA). There is nothing to suggest the visa applicant has previously been refused a visa on the basis of a failure to satisfy PIC4020(2A). Therefore cl.4020(2B) is met. The Tribunal finds that the visa applicant meets PIC 4020.

CONCLUSION

33. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.117.223.

DECISION

34. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:
- Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Kira Raif
Senior Member